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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1970

MARTIN DIES, JR., ET AL.,
Appellants

vs.

VAN PHILLIP CARTER, ET AL.,
Appellees

On Appeal from the United States District Court for the Northern District of Texas, Dallas Division

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NO. 1606

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On Appeal from the United States District Court for the Northern District of Texas, Dallas Division

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BRIEF FOR APPELLANTS

OPINION BELOW

The opinions of the Three Judge Court appear in the Single Appendix at pages 145 and 154. The opinions are reported at 321 F.Supp. 1358 (1970). This case involves filing fees for political party primaries. The Three Judge Court held that to use a filing fee as a revenue raising device or as an absolute requirement for access to the ballot is unconstitutional.

JURISDICTION

The Appellants invoke the jurisdiction conferred upon this Court by 28 U.S.C. §1253 to review on direct appeal an order granting a permanent injunction in a civil action required by Act of Congress to be heard and determined by a three-judge district court.

The judgment was entered on the 21st day of December, 1970 (A. 160). Since it was a final adjudication on the merits of the issues presented, the Appellants filed Notice of Appeal in the district court on the 19th day of February, 1971 (A. 162), which was within the 60-day period prescribed by 28 U.S.C. §2101(b), and in compliance with Rule 11(3) of this Court. On the 21st day of April, 1971, the Appellants complied with the requirements of Rule 13 of this Court. Thereafter, this Court by its Order of June 7, 1971, noted probable jurisdiction. The foregoing clearly demonstrates the timeliness of the procedural steps necessary to invoke the jurisdiction of this Court.

The Appellees sought in the court below to have the Appellants (certain state officials charged with the responsibility of administering the election laws of the State of Texas and certain county and statewide officials of the Democratic Party in Texas) enjoined from the enforcement of Articles 13.07a, 13.08, 13.08a, 13.15, and 13.16 of the Texas Election Code. In addition, the Appellees sought to have the court below declare the aforesaid provisions of the Texas Election Code unconstitutional. The court below granted the relief sought by the Appellees by declaring Articles 13.07a, 13.08, 13.08a, 13.15, and 13.16 of the Texas Election Code unconstitutional, and further decreed that the State of Texas, through its political parties, was enjoined from the enforcement of Articles 13.07a, 13.08, 13.08a, 13.15, and 13.16 of the Texas Election Code.

The jurisdiction of this Court to review the judgment of the court below is conferred by 28 U.S.C. §1253. *Flast v. Cohen,* 392 U.S. 83, 88 S.Ct. 1942, 20 L.Ed.2d 947 (1968); *Zemel v. Rush,* 381 U.S. 1, 85 S.Ct. 1271, 14 L.Ed.2d 179 (1965); *United States v. Georgia Pub. Serv. Comm.,* 371 U.S. 285, 83 S.Ct. 397, 9 L.Ed.2d 317

(1963); *Florida Lime & Avocado Growers v. Jacobsen*, 362 U.S. 73, 80 S.Ct. 568, 4 L.Ed.2d 568 (1960).

STATUTES INVOLVED

The Legislature of the State of Texas, acting pursuant to the mandate of Section 2 of Article XVI of the Constitution of Texas to provide for laws regulating elections within the State of Texas, has enacted various statutes dealing with the election process within this State. The statutes under attack in this proceeding constitute a portion of such election laws of the State of Texas and are statewide in application. The enactments held invalid by the court below are sections 13.07a, 13.08, 13.08a, 13.15, and 13.16. The full text of these statutes appear in Appendix C of Appellant's Jurisdictional Statement. The relevant portions of these statutes are quoted here for the court's convenience:

> "Art. 13.07a. Deposit to accompany application for place on ballot.
>
> "(1) Every candidate for public office who is subject to assessment by the county executive committee for a portion of the expenses of holding the primary election, except candidates for the Legislature and for the State Board of Education, shall pay to the county chairman, at the time of filing his application for a place on the ballot, a deposit of fifty dollars.
>
> . . . . . .
>
> "(2) After the county executive committee makes the assessments provided for in Section 186 of this code, it shall refund to each candidate within thirty days thereafter the amount of the payment in excess of the assessment against the candidate if the deposit exceeds the assessment. If the deposit does not exceed the assessment, the balance due on the assessment shall be paid as provided

in Section 186. Amended by Acts 1967, 60th Leg., p. 1909, ch. 723, § 41, eff. Aug. 28, 1967.

"Art. 13.08. Expenses of primary.

"(1) Prior to the assessment of the candidates, the county committee shall carefully estimate the cost of printing the official ballots, renting polling places where same may be found necessary, providing and distributing all necessary pool books, blank stationery and voting booths required, compensation of election officers and clerks, and all other necessary expenses of holding the general primary and second primary in such county and on the second Monday in February preceding each primary, shall apportion such cost in such manner as in their judgment is just and equitable among the various candidates for nomination for district, county, and precinct offices only as herein defined, ... In making the assessment upon any candidate the committee shall give due consideration to the importance, emolument, and term of office for which the nomination is to be made. . . . . the difference between the amount of the assessment and the amount of the deposit which accompanied the candidate's application must be paid to the chairman on or before the fourth Monday in February; and no person's name shall be placed on the ballot unless he pays the assessment within the prescribed time."

SUMMARY OF ARGUMENT

The three judge court held that the compelling State interest test applied to primary filing fees. The Appellants contend that the rational relation test applies.

The three judge court held that a filing fee violates the first amendment and due process and equal protection causes of the Fourteenth Amendment when it is used as a revenue collecting device or when made an absolute qualification in order for a candidate to get

his name on the ballot. The Appellants contend that both of these holdings are erroneous.

STATEMENT

This case had its initial origin in three separate suits (A. 49) which were consolidated by the Court below (A. 49). Some of the Appellees were candidates for election, and other Appellees were individuals who desired to vote for those Appellees seeking to run for election to public office. Please note that this is a *party primary* case and not a General Election case.

The Appellees brought this action on behalf of themselves and the class of all other persons similarly situated requesting that Appellants be enjoined and restrained from enforcing the provisions of Articles 13.07a, 13.08, 13.08a, 13.15, and 13.16 of the Texas Election Code which require that candidates for party nomination to offices in the general election must pay filing fees as set out in the challenged sections of the Texas Election Code in order to have their names placed on the official ballot in the Democratic primary election. As a basis for such relief, the Appellees alleged that the requirement for the payment of such filing fees violates the due process and equal protection clauses of the Fourteenth Amendment of the United States Constitution. Some of the Appellees are candidates for election to certain local and statewide offices, who alleged that they could not afford to pay the filing fee required to have their name placed on the ballot in the Democratic Party primary election. The remaining Appellees are Intervenors who desire to vote for the Appellees who were candidates for public office.

Specifically, the Appellees have alleged that the filing fee assessments are unreasonably high and without any

reasonable relation to any legitimate legislative purpose.

The cost of primary elections in Texas in all counties must be paid out of assessments made against the candidates who seek nomination to precinct, county or district public office in such election (Stipulation of Fact No. 15, A. 112). In accordance with the provisions of Article 1308 of the Texas Election Code the county executive committee of the political party apportions the cost, by assessment, of primary elections among the various candidates. (Stipulation of Fact No. 6, A 110)

Those Appellees who were candidates for various elective offices in the primary elections did not make the required payment of their assessment or filing fees and therefore their names would not, and could not, pursuant to the provisions of the challenged statutes, appear upon the primary election ballot (Stipulations of Fact Nos. 10, 11, 13, 14, 21, 22, 23(d)(e), 31, 35, 36, A. 109). However the court below by an order dated the 2nd day of May, 1970, relieved the Appellees from the requirement of paying such assessments or filing fees (A. 105). The filing fees of the Appellee Pate were $1,424.60 (for the office of County Commissioner), for the Appellee Carter the sum of $1,000.00 (for office of Commissioner of the General Land Office), and for the Appellee Wischkaemper the sum of $6,300.00 (for the office of County Judge). See Stipulations of Fact Nos. 31, 23(d), and 8, A.109)

The procedure used in arriving at the assessment is set out in Art. 13.08(1):

> "(1) Prior to the assessment of the candidates, the county committee shall carefully estimate the cost of printing the official ballots, renting poll-

ing places where same may be found necessary, providing and distributing all necessary poll books, blank stationery and voting booths required, compensation of election officers and clerks, and all other necessary expenses of holding the general primary and second primary in such county . . ."

The court below, in its opinion and judgment, has declared the challenged provisions of the Texas Election Code unconstitutional and has enjoined their enforcement by the Appellants.

INTRODUCTION

This Court has held that political party primaries are State action. *Smith v. Allwright,* 321 U.S. 649, 64 S.Ct. 757, 88 L.Ed. 987 (1944). We feel bound by this Court's decision in the *Smith* case, and therefore, in the main portion of this brief we shall treat the political party primaries as though they were exactly the same thing as the general election. We do feel that a valid distinction exists between a nominating election and a general election.

We would respectfully direct this Court's attention to its recent opinion of *Jenness v. Fortson,* No. 5714-October term, 1970, 39 LW 4791. In this case the court held:

> ". . . there is surely an important state interest in requiring some preliminary showing of a significant modicum of support before printing the name of a political organization and its candidates on the ballot—the interest, if no other, in avoiding confusion, deception, and even frustration of the democratic process at the general election."

Thus, this Court found that the State of Georgia had some way to control their general ballot, other than through a filing fee.

Exhibit A of this brief sets forth the full text of House Bill No. 5 which was passed recently by the Legislature of the State of Texas. The Court will note that this Bill is to become effective only upon the condition that, before January 1, 1972:

> "(1) the Supreme Court of the United States does not dispose of the appeal filed in that court from the judgment of the United States District Court for the Northern District of Texas, Dallas Division, in Civil Action No. CA 3-3635-C, styled Van Phillip Carter vs. Martin Dies, Jr., et al., by action which becomes final before January 1, 1972; or
>
> (2) the Supreme Court of the United States affirms or refuses to review the judgment of the dsitrict court in the aforesaid case, or by other action taken upon an appeal of that case *the Supreme Court rules that either of the following sections of the Texas Election Code as they exist before the amendments made by this Act violates the Constitution of the United States: Sections 185a, 186, 186a, 193, and 194.*" (Emphasis added)[1]

This legislation shows how the State of Texas is attempting to deal with the problem of political party primaries, if this Court holds that the statutes in question are unconstitutional. If this Bill becomes effective, because of the ruling of this Court, we would like to point out one possibility which we feel is very much of a probability.

The Bill provides that if one is unable to pay the filing fee, that he can file a pauper's affidavit and have his name placed on the political party primary ballot. We can almost promise this Court that there will be some conserted effort by some group, regardless of political persuasion of the particular group, that will

[1]These are the statutes in issue in the case at bar.

flood the ballot. The State of Texas will be forced to immediately call its Legislature into session and try to devise another way to regulate the primary ballot. Aside from the problem of how you finance primaries, filing fees serve to regulate the ballot in primary elections just as they do in general elections. In General Elections the States have an alternative method of regulating the ballot (See *Jenness*). The only alternative method which we can invision to regulate a primary ballot is to also require a petition in order to get on the primary ballot. Of course, this Court can see that this defeats the whole purpose of having primaries. The alternative to a filing fee as a regulatory measure, is either to have some sort of primary to see who can get on the primary ballot or require a petition. We recognize the problems of wealth and join with those who believe that a man's wealth has little to do with his qualifications to hold public office. However, the solution to regulating the number of people who get on a primary ballot is neither an easy one or capable of clear and precise judicial managable standards.

One solution to the dilemma into which this Court is leading political parties, if they hold that filing fees cannot be used to regulate primary ballots, would be to re-examine the broad sweeping language of *Smith v. Allwright,* supra. The object of the laws in *Smith* was to keep an entire class of voters out of the voting book. This Court properly held that the white primaries violated the Equal Protection clause through invidious discrimination. The vehicle that this Court used to invalidate the challenged laws was a determinative that a political party primary was State action. We ask this Court to reconsider the problem of whether or not everything involved in a primary election must be State action and must be run exactly the same way as a General Election. A poor man, if he has a

modicum of support, has an alternate route to having his name on the ballot and to ultimate election. He does not have to run in a party primary. The laws of the State of Texas for getting on the general ballot are much more lenient than those of the State of Georgia. See Texas Election Code, sections 13.50 et seq. and compare *Jenness v. Fortson,* supra.

We feel bound by this Court's decision in *Smith,* and will therefore, treat this appeal as though the primary was exactly the same as the general election. Because there is an obvious difference in a primary and the general election, we feel that this Court, after it thoroughly examines the issues at bar, will desire to reconsider the broad, sweeping language of *Smith.*

ARGUMENT

The central issue in a filing fee case involving a primary election is whether or not the burden of proof is on the State to show a compelling State interest in order to sustain its laws, or whether the burden of proof is on the Appellees to prove that the State laws do not bear a rational relation to the ends sought to be accomplished and that the laws cause invidious discrimination.

The reasoning of the three judge court. The first step in the reasoning of the court below was:

> "Since the rights of the intervenors as voters will be determinative of the constitutionality of the laws here attacked, we deem it unnecessary to discuss the rights of the candidates."

Shifting the thrust of the whole case from one involving candidates and filing fees to one involving rights of voters is the point at which the court first committed error. The Court decided that the voters in the case at

bar were being denied the right to vote, that the right to choose one's candidate involved the First Amendment, and that the compelling State interest test applied. The Court cited *Williams v. Rhodes,* 393 U.S. 23, 89 S. Ct. 5 (1968). Judge Thornberry, in his concurring opinion thought that the *Williams* test was involved and that only a compelling State interest can justify a State's limiting First Amendment freedoms.

This interpretation of the *Williams* case finds support in 83 Harvard Law Review 95:

> "The *Williams* Court also characterized a second interest as fundamental under its equal protection analysis, and in doing so marked another striking departure from past doctrine. In past decisions, the fundamental interest in the franchise has been invoked when one's vote was not counted, when free access to the ballot box was impaired, or when one's vote was not given equal weight vis-a-vis other votes in the political unit. The voting interest protected in *Williams* was quite different. It was an interest in casting a ballot for the *particular candidate* that one prefers above all others. The Court seems to have interpreted 'the right to cast . . . [a] vote effectively' to protect a full range of self-expression, to extend not only to the casting and counting of ballots but also to what a voter may put on his ballot." (emphasis supplied)

Mr. Chief Justice Warren recognized the very problem which is involved in this case in *McDonald v. Board of Election Commissioners of Chicago,* 394 U.S. 802, 806, 89 S. Ct. 1404, 1407 (1969):

> "Before confronting Appellants' challenge to Illinois' absentee provisions, we must determine initially how stringent a standard to use in evaluating the classifications made thereunder and whether distinctions must be justified by compelling State interest;"

The Appellants submit that the three judge court did not properly understand the distinction between the line of cases which *McDonald, Williams,* and *Jenness* represent on the one hand, from the line of cases represented by *Kramer v. Union Free School District,* 395 U.S. 621, 89 S. Ct. 1886 (1969); *Cipirano v. City of Houma,* 395 U.S. 701, 89 S. Ct. 1897 (1969); *Phoenix v. Kolodziejski,* 399 U.S. 204, 90 S. Ct. 1990 (1970); *Carrington v. Rash,* 380 U.S. 89, 85 S. Ct. 775, 13 L. Ed. 2d 675 (1965).

Mr. Chief Justice Warren pointed out the distinction between these two lines of cases in *Kramer.* In footnote 6 found on page 1889 of the Supreme Court Reporter edition:

> "This case presents an issue different from the one we faced in McDonald v. Board of Election Comm'rs of Chicago, 394 U.S. 802, 89 S. Ct. 1404, 22 L. Ed. 2d 739 (1969). The present appeal involves an absolute denial of the franchise. In McDonald, on the other hand, we were reviewing a statute which made casting a ballot easier for some who were unable to come to the polls. As we noted, there was no evidence that the statute absolutely prohibited any one from exercising the franchise; at issue was not a claimed right to vote but a claimed right to an absentee ballot. *Id.,* at 807-808, 89 S. Ct., at 1408."

In *Kramer, Carrington, Cipriano, Kolodziejski,* the laws in question were fencing out voters entirely from the voting booth. Otherwise qualified voters were denied the right to vote entirely because of a particular classification into which they fit. They could not go to the polls at all to vote for anyone in the particular election in question.

In *McDonald,* the issue involved an extension of the basic right to vote. That is, your basic right is to appear

at the polls in person and vote, and an an absentee ballot extends that right. Any extension of that right is a legitimate regulation by the State and should be tested under the rational relation test.

In the case at bar, no voter is fenced out of the voting booth by the filing fee requirement. The filing fee simply limits the person for whom the voter may cast his ballot. This is exactly the same problem with which the Court was confronted in *Williams*. The Ohio laws did not prohibit any voter from voting. The Ohio law simply made it impossible for another political party to get organized in the state of Ohio. Mr. Justice Black held that "the totality of the Ohio restrictive laws taken as a whole impose a burden on voting and associational rights which we hold is an invidious discrimination in violation of the Equal Protection Clause."

In *Jenness,* Mr. Justice Stewart found that the laws of the State of Georgia did not create an invidious discrimination and bore a rational relation to a legitimate state end.

It is true that language can be found in both *Williams* and *Jenness* which mention the words compelling state interest and important state interest. This court will recall that traditionally First Amendment problems have been treated under the compelling state interest test, while equal protection problems have been treated under the rational relation test. Please see the dissenting and concurring opinions in *Williams,* and *Harper v. Virginia State Board of Elections,* 383 U.S. 663, 86 S.Ct. 79, 16 L.Ed.2d 169 (1966).

There is another school of thought which says that any time voters rights problems arise, that the laws are subject to close and careful scrutiny, *Kramer*. The

Harvard Law Review staff, supra, at page 90, thought that the *Williams* court expanded a developing doctrine by including a First Amendment interest in the pantheon of fundamental interests for purposes of equal protection analysis.

Any time that voter rights are involved, the court can create arguments that talk about political expression and reach First Amendment rights. One can say that the vote is the ultimate of political expression, and that to limit the choice of a voter places a limitation on his free speech rights. Therefore, anything which limits a voter's choice of candidates, such as a fee, or a petition in order to get on the ballot (Jenness) is a first amendment problem.

We reject this analysis. We think that this case is about fees and political party primaries, and whether two men: one rich and one poor, are being treated equally, or whether there is invidious discrimination. To us that is an equal protection problem and the overlap between equal protection and First Amendment rights is slight. We submit that voter's rights do constitute a special category of equal protection problems. See the reasoning found in *Yick Wo v. Hopkins*, 118 U.S. 356, 30 L.Ed. 220 (1886).

This Court in *Kramer* correctly pointed out the distinction which this court should use in determining whether or not a particular limitation is a voting rights case or a case where the state is exercising legitimate interests in regulating the ballot. The court should look at the law and determine whether or not it keeps any voter from the voting booth. If it does, then fundamental voting rights are at stake and the law is subject to close and careful scrutiny and a compelling

state interest must be shown.[1] If the law under examtion does not prohibit anybody from voting, then the rational relation test should be applied by the court.

Access to a primary ballot by candidates is an equal protection problem. The Appellees are wanting to associate with a certain particular group, and the issue is whether or not they are being deprived of equal protection of the law.

I. ISSUE GOVERNED BY THE RATIONAL RELATION TEST.

A review of the cases since *Kramer* reveal that once any court decides that the state has the burden of establishing a compelling state interest, that the ball game is really already over. Therefore, we are going to discuss in detail the problem of whether or not a filing fee in a political party primary bears a rational relation to a legitimate state end. However, we submit that for the reasons stated in the remainder of this brief, that if the State of Texas must meet the burden of establishing that a compelling state interest exists, then there do exist such interests and this court should reverse the Three Judge Court. We would point out to this court that the record contains a large number of stipulations. There are ample stipulations in this record for the court to decide this case on the merits, regardless of who has the burden of proof. This case should not be remanded for further development of facts.

II. APPLICATION OF THE RATIONAL RELATION TEST.

Because of the action of the Legislature of the State of Texas in enacting the conditional amendments to

[1]For example, should a convicted felon be denied the right to vote.

the Texas Election Code, this Court is presented with a two-fold problem: deciding the validity of the second statute, if the Court finds that the first statute creates an invidious discrimination which keeps the statute from bearing a rational relation to a legitimate state interest.

The three judge court has held that a filing fee may not be used as a revenue raising device. We would like to point out that the filing fee is not used in Texas as a revenue raising device, in the traditional sense that "revenue raising" is used. When Texas had a poll tax, this was used as a revenue raising device. The money which was collected from the sale of poll taxes went into the permanent school fund to help finance the education of the children of the State of Texas. No excess money is raised by the filing fees. All of the money that it does not take to run the political party primaries is refunded to the candidates, Article 13.08. We can more accurately describe the filing fee, as it is used in the State of Texas, as a method to finance a primary election, rather than a revenue raising device. We should therefore read the lower court's opinion as saying that it is unlawful to use a filing fee as a method to finance a primary election.

We see four methods that political parties can use to finance their primaries. *First,* they may use filing fees and the three judge court has struck this down. *Secondly,* they may hold no primary at all and nominate by convention. This eliminates the cost almost entirely. *Third,* we may require the States to finance primary elections. This is done in a number of States. *Fourth,* we may require that the primaries be financed through voluntary contributions. We feel that this Court can see that the alternatives left open to political parties who desire to hold primary elections is relevant

to the question of whether or not a filing fee as a financing device bears a rational relation to a legitimate State purpose. Consequently, we would like to explore with the Court just what happens when you must finance a primary election through either alternatives number three or four listed above.

Let us first examine the problems which arise when the State finances the primary elections. First, since the State is going have to finance all primary elections, this Court will have to examine (similar to the problems that arose in *Williams* and *Jenness*) the laws of all fifty States and see if their definition of when a "political body" becomes "political party" so as to become entitled to have the State finance their primary. Secondly, if a third party candidate gets the requisite number of votes for governor to be a political party in the next election, must the State, besides financing a primary for governor in the next election, also finance a primary for each and every public office in each and every precinct within the State? Thirdly, the review of many well reasoned and knowledgable studies reveal that the stability of the governments of the English speaking peoples of this world is due primarily to the fact that they have essentially two party systems. This Court knows better than the authors of this brief that the ties that bind the Democratic Party and the Republican Party together are much weaker today than they were twenty years ago. If the State agrees to finance everybody at a primary election, we submit that this probably will cause a prolifieration of political parties and contribute to the breakdown of our two party system. It is quite a different thing to say that the ease with which a party may have access to the general ballot, applies equally to the State financing a party primary. Mr. Justice Black, in *Wil-*

liams, rejected as "theoretically imaginable" the proliferation of political parties. In *Williams* the problem was the totality of laws to get on the ballot. No one was agreeing to finance anyone. If you start having free money available, the problem *may* be different.

The Appellants submit that to do away with the candidate's having to pay these filing fees, which pay for the primary elections, will actually place another burden upon the voter which is not presently there. If the costs of conducting the primary elections are removed from those candidates who are seeking political offices and which do so under the banners of a particular political party, then the alternative which the court below has forced upon the State of Texas is that they must be assumed by State and local governmental bodies. Today these governmental bodies are being increasingly faced with the almost unsurmountable problems of the rising demands for the use of the tax dollar. The court below in its decision has added yet another burden to the staggering costs of State and local government—the costs of financing the primary elections of all political parties. Needless to say, the taxpayer will ultimately have this additional cost added to his already increasngly staggering burden. The court below has apparently treated the taxpayer and the voter as two separate and distinct bodies. This, however, is to create a fantasy, because each and every voter is also either directly or indirectly a taxpayer. Actually the decision of the court below has merely transferred the costs of primary elections from the candidates to the voters. The court below has based its decision essentially on the assumption that the present filing system in Texas as to primary elections places an undue burden on the voter. The Appellants submit that the decision of the court below, in now placing the

costs of the primary elections upon the voter, places a far heavier burden on the voter than existed prior to the court's decision. In addition, the court's decision has virtually insured a large list of candidates in every primary election with additional run-off elections then becoming virtually certain with increased election costs. The court below has not lessened the burden upon the voter by its decision—it has merely increased the voter's already staggering tax burden. Perhaps it might be well at this time for this Court to also consider the rights of the taxpayers of this country as well as their duties to support the costs of our government.

How well does the alternative of having party primaries financed by voluntary contributions fare? We would point out to the Court that there is no guarantee that sufficient voluntary contributions could be raised to conduct primaries. If this were to happen, then the logical response which should be made to this situation would be that since the parties do not have enough support to finance a party primary, the parties just do not need to hold primaries. We would ask this Court whether or not that argument sounds familiar. Has the argument not been advanced many times that if a candidate does not have sufficient support to raise the filing fee, that he does not need to be a candidate? That is exactly the same type of reasoning that you would be applying to political party primaries if they could not raise sufficient private support to finance their primaries. It seems to us that the requirement that primaries be privately financed presents a circular solution to the problem, which is no solution at all. That is, if the outlawing of filing fees has the effect of eliminating the primary altogether, it is not really a solution to the poor persons' or the rich persons' problem.

From the above discussion, one thing can be clearly seen: To *absolutely* outlaw *all* filing fees as a financing device for party primaries is not a workable solution. We submit that filing fees are the best solution to financing party primaries.

This concludes our discussion of the first of several interests, which the State must attempt to balance in enacting the filing fees as an absolute requirement to getting on the ballot. We have seen that as far as financing the primaries, there certainly are problems with any alternatives to eliminating the filing fee as a financing device.

A second interest which is involved in the State legislation under consideration here is whether or not the filing fee can be and should be made an absolute requirement in order to get on the primary ballot and be the sole method through which the candidate's name can appear. The case of *Jenness v. Little,* 306 F. Supp. 925 (1969), held that "to prohibit candidates from getting their names on the ballot solely because they cannot post a certain amount of money is illegal and unconstitutional." To the same effect is *Georgia Socialist Workers Party v. Fortsen,* 315 F. Supp. 1035 (1970). Both of these cases involve general elections as opposed to primary elections. As we have pointed out before, the state of Georgia had another way to regulate the size of their general ballot. (*Jenness*) The thrust of our argument is "does the same rationale apply to the primary ballot?" We submit that it does not. The fee can be used by political parties to regulate the size of their primary. The only other method that they can use to regulate the size of the primary is a petition. As we have stated before, this forces a political party to have a primary to see who can get on the primary ballot. Obviously, a petition is not a primary,

but the point is that you are making political parties substitute an onerous requirement of a petition, for the method that they previously used to control the size of their ballot. These petitions will breed litigation as to whether or not the right people signed them and whether or not they were qualified to sign the petition. The interests to be viewed and weighed and balanced are those of an indigent who cannot afford the filing fee, as opposed to the added work and potential litigation that is created by the requirements of a petition. We would respectfully point out to this Court that we understand and agree with and affirm the rationale of Mr. Justice Douglas in *Harper*: "Voter qualifications have no relation to wealth or to paying or not paying this (poll) or any other tax." However, just because a man does not have a filing fee to get on the political party's primary ballot, does not mean that he is foreclosed from the ballot. The facts are that this court has recently held in *Jenness* that a 5% petition requirement is not unconstitutional. The State of Texas requires only 1%. The man who cannot afford the filing fee of the Democratic Primary, is not foreclosed from the ballot. He has other alternatives. He can get on the General Ballot.

It is no argument to respond that the poor man ought to be able to get on the Democratic Party's ballot, rather than having to wait until the general ballot because the Democratic Party nomination is tantemount to election. If the Democratic nomination is tantemount to election, this means that everybody is going to vote in the Democratic Primary. Therefore, if you would be able to convince them in the Democratic Primary, you ought to be able to convince them in November. The Court will notice that we are not asserting that the fact that the man does not have the

money for a filing fee is tantemount to defeat because of the costs of running an election. We do not consider this a relevant question as far as access to the ballot is concerned. We think that as long as a poor man has a reasonable opportunity to get on the ballot in November, that the fact that he cannot get on the party's primary ballot, because he cannot pay the filing fee, does not invidiously discriminate against the poor man. The object of our constitution is to make the ballot equally accessible to all people. The right to vote is deemed fundamental. But how many times does a man have a right to get on a ballot? The question really revolves itself right back into the *Smith v. Allwright.* Is the primary election exactly the same thing as the general election? The Court will note that there is a significant difference between our case and *Smith v. Allwright.* In *Smith,* those persons against whom the law discriminated were kept away from voting entirely. In the case at Bar, those against whom the law discriminates can vote, they just cannot get their own candidate on the ballot. We submit that the distinction which Judge Warren drew in *Kramer,* between *Kramer & McDonald,* applies in this case. When you consider that a political party has a legitimate interest in financing its primary, in controlling the number of people on the ballot so to avoid voter confusion; when you consider the alternatives to using the filing fee to accomplish the previous two ends, and when you consider that the aggrieved party has another avenue open to him to espouse his cause; then the poor man is not invidiously discriminated against by being required, as an absolute requirement to get on a party primary ballot, to pay a filing fee.

III. ENACTMENT OF HOUSE BILL 5.

We would like to examine the problem of whether or

not HB 5 solved the constitutional problem, in the event this Court should decide that absolute requirements of a filing fee constitutes an invidious discrimination. Texas has not abandoned the filing fee as a financing device for their political party primary. They have simply substituted a pauper's oath to solve the poor man's problem. We assume that the Appellees in this case will argue that this statutory scheme also involves invidious discrimination, and that either the State or private donations should finance the primary election. They will probably argue that to require a poor man to file a pauper's affidavit creates a stigma and amounts to certain defeat in the election, because of the attitude that the everyday voter will have towards the man that has filed a pauper's oath. We would submit to this court that that argument does not hold water. If one follows that argument, then all filing fees are per se invidious discrimination. There will always exist some one who can afford no fee at all.

We would point out to this court that there is also a stigma involved in being rich. It is true that there would probably be more votes lost by a poor man because he filed a pauper's oath than by a rich man because he was rich. However, there are people that we all know personally who refuse to vote for certain candidates because of the amount of wealth which they possess at the time they present themselves as candidates for public office. They consider the wealth just as much stigma as some people consider it a stigma to be a pauper. This court should not let the degree of favor that the voters may hold for wealth or poverty be a basis for declaring all filing fees a per se invidious discrimination.

We submit that the state of Texas has a reasonable solution that does not involve invidious discrimination

in HB 5. If there is an invidious discrimination in having a filing fee be an absolute requirement for access to the ballot, then the pauper's oath solves the problem and erases the invidious discrimination.

There is nothing in the record before this Court to show that the challenged laws made it impossible for Appellees to vote. *Certain of the Appellees may not have had the opportunity to vote for candidates they might have liked to have seen on the ballot,* but this differs drastically from an absolute denial of voting. The primaries simply are not the general elections. The Court should either reconsider *Smith,* or conclude, as we do, that under all the circumstances there is no invidious discrimination. As long as there is an alternative access to the ballot for the poor man, no invidious discrimination exists.

The proscription of the Equal Protection Clause does not go beyond the invidious discrimination, *Williamson v. Lee Optical of Oklahoma,* 348 U.S. 483, 75 S.Ct. 461, 99 L.Ed. 563, 573 (1955), for ". . . mere classification, as this Court has often said, does not of itself deprive a group of equal protection." *Carrington v. Rash,* 380 U.S. 89, 92, 85 S.Ct. 775, 13 L.Ed.2d 675, 678 (1965); *Oregon v. Mitchell,* 400 U.S. 112, 127, 91 S.Ct. 260, 266, 27 L.Ed.2d 272, 283 (1970); *Reynolds v. Sims,* 377 U.S. 533, 84 S.Ct. 1362, 12 L.Ed.2d 506 (1964); *Pate v. El Paso County,* 324 F.Supp. 935 (W. D. Tex. 1970) aff'd 400 U.S. 806, 91 S.Ct. 55, 27 L.Ed. 2d 38 (1970). The gravamen of equal protection lies not in the fact of deprivation of a right through state action, but that such deprivation is accomplished by means of an invidious classification. *Snowden v. Hughes,* 321 U.S. 1, 64 S.Ct. 397, 88 L.Ed. 497 (1943); *Lindsley v. Natural Carbonic Gas Co.,* 220 U.S. 61, 31 S.Ct. 337, 55 L.Ed. 369 (1911); *Walters v. City of St.*

Louis, 347 U.S. 231, 74 S.Ct. 505, 98 L.Ed. 660 (1954). ". . . [T]he necessity of a showing of purposeful discrimination is no less in a case involving political rights than in any other. It was not intended by the Fourteenth Amendment and the Civil Rights Act that all matters formerly within the exclusive cognizance of the states should become matters of national concern." *Snowden v. Hughes, supra,* 321 U.S. at 11, 88 L.Ed. at 505. See *Oregon v. Mitchell,* 400 U.S. 112, 127, 91 S.Ct. 260, 266, 27 L.Ed.2d 272, 283 (1970). Recognizing that the nature of our federal system allows the states broad leeway with regard to legislation in the field of social, economic, and poltical matters, the decisions of the Supreme Court teach us that any classification resulting from the application of such laws does not offend equal protection as long as it is reasonble and is rationally related to furthering a legitimate state interest.[*]

> "The constitutional safeguard is offended only if the classification rests on grounds wholly irrelevant to the achievement of the State's objective. State legislatures are presumed to have acted within their constitutional power despite the fact that, in practice, their laws result in some inequality. A statutory discrimination will not be set aside if any state of facts reasonably may be conceived to justify it.

McGowen v. Maryland, 366 U.S. 420, 81 S.Ct. 1101, 6 L.Ed.2d 393, 399 (1961); *McDonald v. Board of Election Commissioners of Chicago,* 394 U.S. 802, 89 S.Ct. 1404, 22 L.Ed.2d 739 (1969).

The Supreme Court has recently had occasion to explore in depth the nature and extent of the power of the states to prescribe qualifications for voting and to

[*]Financing the primaries and regulating the ballot.

regulate the electoral process in *Oregon v. Mitchell*, 400 U.S. 112, 91 S.Ct. 260, 27 L.Ed.2d 272 (1970). Despite the diverse views expressed in the five opinions written in that case, it is clear that, with the exception of the statement regarding the power of Congress under Article I, Section 4, the Chief Justice and Justices Harlin, Steward, and Blackmun agree with the following statement from Justice Black's opinion:

> "No function is more essential to the separate and independent existence of the States and their governments than the power to determine within the limits of the Constitution the qualifications of their own voters for state, county, and municipal offices *and the nature of their own machinery for filling local public offices*. Pope v. Williams, 193 U.S. 621, 24 S.Ct. 573, 48 L.Ed. 817 (1904); Minor v. Happersett, 21 Wall. 162, 22 L.Ed. 627 (1874). Moreover, Art. I, §2, is a clear indication that the Framers intended the States to determine the qualifications of their own voters for state offices, because those qualifications were adopted for federal offices unless Congress directs otherwise under Art. I, §4. . . . It is obvious that the whole Constitution reserves to the States the power to set voter qualifications in state and local elections, except to the limited extent that the people through constitutional amendments have specifically narrowed the powers of the States. Amendments Fourteen, Fifteen, Nineteen, and Twenty-Four, each of which has assumed that the States had general supervisory power over state elections, are examples of express limitations on the power of the States to govern themselves. And the Equal Protection Clause of the Fourteenth Amendment was never intended to destroy the States' power to govern themselves, making the Nineteenth and Twenty-Fourth Amendments superfluous. . . . *In interpreting what the Fourteenth Amendment means, the Equal Protection Clause should not be stretched to nullify the States' powers over elections which*

they had before the Constitution was adopted and which they have retained throughout our history.". Id., 400 U.S. at 125-126, 91 S.Ct. at 265-266; 27 L.Ed.2d at 281-282." (Emphasis added)

A remote limitation on a particular voter (the possibility that *his* candidate is not on the ballot) is no reason to depart from this principal. The Supreme Court has never suggested that the states have anything but an unimpeachable right under the Constitution to prescribe election procedures within state, and, as long as those procedures "do not invidiously discriminate against any discrete and insular minority" they cannot constitute a denial of equal protection and need not be judged by the compelling interest test. *Oregon v. Mitchell,* 400 U.S. 112, 296, 91 S.Ct. 260, 349-350, 27 L.Ed.2d 272, 379 (1970). Consequently, the laws in question should not have been judged by the compelling interest test.

The question has long been laid to rest with respect to the constitutional right of a candidate to run for public office. In *Snowden v. Hughes,* 321 U.S. 1, 88 L.Ed. 497 (1943), this Court held that the right to become a candidate for state office is a right or privilege of state citizenship, not of national citizenship, which alone is protected by the privileges and immunities clause of the Fourteenth Amendment. This Court made the following observations, at page 502:

"The protection extended to citizens of the United States by the privileges and immunities clause includes those rights and privileges which, under the laws and Constitution of the United States, are incident to citizenship of the United States, but does not include rights pertaining to state citizenship and derived solely from the relationship of the citizen and his state established by state law. Slaughter-House Cases, 16 Wall. (US) 36, 74 79 21 L ed 394, 408, 409; Maxwell v. Bugbee,

250 US 525, 538, 63 L ed 1124, 1130, 40 S Ct 2; Prudential Ins. Co. v. Check, 259 US 530, 539, 66 L ed 1044, 1052, 42 S Ct 516, 27 ALR 27; Madden v. Kentucky, 309 US 83, 90-93, 84 L ed 590, 594-596, 60 S Ct 406, 125 ALR 1383. The right to become a candidate for state office, like the right to vote for the election of state officers, Minor v. Happersett, 21 Wall. (US) 162, 170-178, 22 L ed 627, 629-631; Pope v. Williams, 193 US 621, 632, 48 L ed 817, 822, 24 S Ct 573; Breedlove v. Suttles, 302 US 277, 283, 82 L ed 252, 256, 58 S Ct 205, is a right or privilege of state citizenship, not of national citizenship which alone is protected by the privileges and immunities clause."

The Appellees and the court below attempt to distinguish this case by stating that the complaint does not go to the privileges and immunities clause of the Fourteenth Amendment, but rather goes to the equal protection clause and therefore *Snowden v. Hughes* is readily distinguishable. A careful reading of *Snowden v. Hughes,* however, clearly shows that this Court also dealt with the equal protection clause with respect to the constitutional right of a candidate to run for public office in one of the states of the union. In dealing with the equal protection clause, the Court goes on in *Snowden, supra,* to state the following:

> "More than forty years ago this Court determined that an unlawful denial by state action of a right to state political office is not a denial of a right of property or of liberty secured by the due process clause. Taylor & Marshall v. Beckham, 178 US 548, 44 L ed 1187, 20 S Ct 890, 1009. Only once since has this Court had occasion to consider the question and it then reaffirmed that conclusion. Cave v. Missouri, 246 US 650, 62 L ed 921, 38 S Ct 334, as we reaffirm it now."

If Snowden applies to the privileges and immunities clause and the due process clause, surely it applies to

the Equal Protection Clause of the Fourteenth Amendment.

In addition, this Court's comment in *Williams* that "multitudinous fragmentary groups might justify some regulatory control but . . . at the present time the danger seems to be no more than 'theoretically imaginable' . . ." may well be appropriate when related to *political parties* being placed upon the ballot, but becomes a far different problem when we discuss candidates for a primary. One can but guess how many candidates might make the race for the publicity gained, or whether we will see a return of the abused practice of seeing numerous candidates of the same name entered in the same race for the obvious purpose of aiding or damaging one of the candidates. The potential for "legal disruption" is almost unlimited.

What guidelines could ever be established to determine when any amount of filing fee might become some form of invidious discrimination. How much one individual is willing to sacrifice financially in the way of a filing fee to obtain public office may well discourage another potential candidate with even more financial means. Just as the personal management of one's fiscal affairs varies as to when they feel able to afford a bigger and more ornate automobile, so does the individual determination of whether to pay a particular amount of filing fee vary from potential candidate to potential candidate. The filing fee as a initial step in entering a career based on public service in elective office is no more a form of invidious discrimination by wealth in the following of a career than the license fees required to engage in many businesses, professions or union dues.

CONCLUSION

The varying interests of the State, the political parties, the candidates, the voters, the taxpayers, and the political subdivisions of the State involved in the election process, present the Legislature of the State of Texas with the complex problem of striking a reasonable and workable balance and solution to regulating the ballot, avoiding voter confusion, financing the election process and making the ballot available to all. The balancing of the many priorities are matters for legislative decision. If the choice of the Legislature is reasonably related to the goal of both financing and providing orderly elections, the fact that there exist alternatives which courts, judges or individuals may feel are better suited to that end does not invalidate the choice made by the Legislature. The inquiry of the courts goes only to whether the means chosen is reasonably related to the purpose to be accomplished. As long as the poor man had a "free," alternative route to the ballot (Jenness), his equal protection rights have not been violated by the loss of the right to get on a particular party's primary ballot.

For the reasons stated herein the judgment of the Court below holding Articles 13.07a, 13.08, 13.08a, 13.15, and 13.16 of the Texas Election Code unconstitutional should be reversed and judgment here rendered sustaining the validity of such statutory enactments and dissolving the injunction entered against the Appellants.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I, Pat Bailey, one of the attorneys for the Appellants, and a member of the Bar of the Supreme Court of the United States, hereby certify that on the 26 day of July, 1971, I served a copy of the foregoing Jurisdictional Statement on the Appellees by depositing a copy in the United States mail, postage prepaid, and addressed to the attorneys of record for Appellees as follows: Mr. H. Averill Sweitzer, 5th Floor, Manor House, Dallas, Texas 75202; Mr. A. L. Crouch, 109 Taylor, Fort Worth, Texas 76102; Mr. John L. Fashing, 608 Southwest National Bank Building, El Paso, Texas 79901; Mr. Fred Weldon and Mr. Stuart R. Abelson, 119 N. Stanton Street, Room 215, El Paso, Texas 79901.

Pat Bailey

PAT BAILEY

EXHIBIT "A"

H.B. No. 5

AN ACT

enacting temporary provisions relating to the method of conducting and financing primary elections and to the fees, assessments, and deposits levied against candidates; amending the Texas Election Code as follows: amending Section 185a, as amended (Article 13.07a, Vernon's Texas Election Code) by adding Subsection (3); amending Subsection (1), Section 186, as amended (Article 13.08); amending Section 186, as amended (Article 13.08), by adding Subsections (5), (6), and (7); adding Section 186c; repealing Section 186a, as amended (Article 13.08a), Section 186a-1 (Article 13.08a-1), and Section 194, as amended (Article 13.16); providing penalties; making the Act effective only upon the occurrence of certain conditions and fixing the expiration date if the Act becomes effective; and declaring an emergency.

BE IT ENACTED BY THE LEGISLATURE OF THE STATE OF TEXAS:

Section 1. Section 185a, Texas Election Code, as amended (Article 13.07a, Vernon's Texas Election Code), is amended by adding Subsection (3), to read as follows:

"(3) If a candidate is unable to pay the deposit or filing fee as required by Subsection (1) of this Section, in lieu of payment he may file with his application a petition of voters, as provided in Section 186c of this code, and he shall not then be required to pay any deposit, fee, or assessment as a condition for having his name printed on the ballot for either the primary election or the general election; when filing such petition, it shall be accompanied by the following affidavit:

" 'I am not financially able to pay the filing fee required to file for the office set forth in the attached application. In lieu therefor I submit the following petition signed by 10% of the number of votes cast for the ---------- (Democratic, Republican, etc.) Party's candidate for Governor in the last preceding General Election in the territory in which I am running.' "

Sec. 2. Subsection (1), Section 186, Texas Election Code, as amended (Article 13.08, Vernon's Texas Election Code), is amended to read as follows:

"(1) On or before the second Monday in February preceding each general primary election, the county committee shall carefully estimate the cost of printing the official ballots, renting polling places where same may be found necessary, providing and distributing all necessary poll books, blank stationery and voting booths required, compensation of election officers and clerks, and all other necessary expenses of holding the general primary and second primary in such county. On the second Monday in February, the committee shall meet and apportion such cost in such manner as in their judgment is just and equitable among the various candidates for nomination for district, county, and precinct offices who did not file with their application a supporting petition of voters as provided in Section 186c of this code, except the offices of Justice of the Court of Civil Appeals and member of the State Board of Education. Where a district office covers more than one county, the assessment of such candidate by the county shall be not more than a sum which is the quotient of the amount which he would be assessed if he represented only one county determined by the formula used to assess county candidates, when divided by the number of counties in his district. In

making the assessment upon any candidate the committee shall give due consideration to the importance, emolument, and term of office for which the nomination is to be made. The committee may not assess any candidate an amount in excess of four percent of the total compensation payable for the particular term of office (full or partial) which he is seeking. Within 24 hours after adjournment of the meeting, the chairman shall mail to each person against whom an assessment is made a notice stating the amount of the expenses apportioned to him and informing him that on or before the fourth Monday in February he must pay to the chairman the difference between the amount apportioned to him and the amount of the deposit which accompanied the application which he filed with the chairman. No such person's name shall be placed on the ballot unless he complies with these requirements within the prescribed time. The notices shall be sent to the candidates by registered or certified mail, and the chairman shall obtain a receipt for each letter, postmarked by the post office at which the letter is mailed, as evidence of the mailing, and shall preserve the receipts for a period of three months."

Sec. 3. Section 186, Texas Election Code, as amended (Article 13.08, Vernon's Texas Election Code), is amended by adding Subsections (5), (6), and (7), to read as follows:

"(5) Notwithstanding any other provision of this section, an assessment shall not be made against a candidate who has filed with his application a petition of voters as provided in Section 186c of this code.

"(6) In conducting the primary elections, the committee is authorized to utilize volunteer unpaid services of election judges and clerks, to accept gratuities of other services and other things of value, and to use

funds derived from contributions, fund-raising events, and other lawful sources by way of supplementing the funds derived from assessments levied under this section.

"(7) If, after the committee has made the assessments authorized by Subsection (1) of this section, a court of competent jurisdiction declares the assessments to be invalid, the committee may reassess the candidates in an effort to bring the amounts within the court's delineation of permissible limits. In the event of a reassessment, the committee shall fix the date by which the new assessments must be paid, which date shall be at least 10 days after the date of the meeting at which the reassessment is made. Within 24 hours after adjournment of the meeting, the chairman shall give notice, in the manner required for notice of the original assessment, to each candidate who has not paid the original assessment. Within 30 days after the date of the meeting, the county chairman shall refund to each candidate who paid the original assessment the difference between the amount of the original assessment and the new assessment."

Sec. 4. The Texas Election Code is amended by adding Section 186c, to read as follows:

"186c. Petition of voters in lieu of payment of assessment or fee

"(a) Notwithstanding any provision in Section 185a, Section 186, Section 190, Section 190a, Section 193, or any other section of this code, a candidate for any public office who files with his application for a place on the ballot in the general primary election a petition which complies with this section is not required to pay the deposit, assessment, or fee required by any other section of this code. The petition must

accompany the application and be filed at the same time that the application is filed. Where a candidate for a district office is required to file an application with more than one county chairman, he shall file the petition with the county chairman in the county of his residence and shall attach to the petition the name and address of each other county chairman with whom an application is filed. He shall attach to the application which is filed with each other chairman a statement that the petition has been filed, giving the name and address of the chairman with whom it is filed. The chairman with whom the petition is filed shall certify to each other county chairman in the district whether the petition complies with the requirements of this section. Where the filing deadline for the office is on or before the fourth Monday in February, the chairman shall make the certification not later than the second Monday in March. Where the filing deadline is after the fourth Monday in February, he shall make the certification within 15 days after the deadline or by the 25th day before the general primary, whichever is earlier.

"(b) A petition which is filed in lieu of the payments required by other sections of this code must be signed by qualified voters eligible to vote for the office for which the candidate is running, equal in number to at least 10 percent of the entire vote cast for that party's candidate for governor in the last preceding general election in the territory (state, district, county, or precinct, as the case may be) in which the candidate is running. Where a candidate is running in a district or precinct which has been created or the boundaries of which have been changed since the last general election, he may request the secretary of state in the case of a district office, and the county judge of the county

in which the precinct is situated in the case of a precinct office, to make an estimate in advance of the filing deadline of the number of votes cast for that party's candidate for governor within that territory at the last general election, and upon receiving such a request the officer shall make the estimate and notify the candidate and each chairman with whom the candidate files an application. The estimate shall be used as the official basis for computing the number of signatures required on the petition. If an advance estimate is not requested, the chairman with whom the petition is filed shall make the estimate before he acts on the sufficiency of the petition. In every instance, the candidate may challenge the accuracy of the estimate, and if he is dissatisfied with the final decision of the officer he may appeal the decision to any district court in the territory involved. The decision of the district court is final.

"(c) The application of a candidate who files a petition under this section must be executed by the candidate personally, and the provision in Section 190 which permits the filing of an application signed by 25 qualified voters is not available to a candidate who files a petition under this section.

"(d) The petition shall show in bold print on each page the following: 'PETITION IN LIEU OF FILING FEE TO PLACE THE NAME OF_____ _____ON THE PRIMARY BALLOT OF _____PARTY FOR THE OFFICE OF _____. PLEASE READ ALL TERMS CAREFULLY,' and the following information with respect to each person signing it: his address, the number of his voter registration certificate for the voting year in which the election is held and also the county of issuance if different from the county in which he resides at the time of signing, and the date of signing.

"(e) No petition may contain the name of more than one candidate. No person may sign the petition of more than one candidate for the same office, and if any person signs the application of more than one candidate for the same office, the signature is void as to all such petitions. However, a person may withdraw and annul his signature by delivering to the candidate and to the chairman with whom the petition is filed (or is to be filed, if not then filed), his written request, signed and duly acknowledged by him, that his signature be cancelled and annulled. The request must be delivered not later than five days before the last day for filing the petition. Upon such withdrawal, the person is free to sign the petition of another candidate for the same office in the same party's primary, but the withdrawal does not have the effect of relieving the candidate of his ineligibility to affiliate with some other political party during the voting year in which the election is held. The candidate from whose petition a signature is withdrawn may file additional signatures to replace the withdrawn signature at any time before the filing deadline, but signatures filed after the date of the candidate's application which may be counted toward the required number shall not exceed the number of withdrawn signatures.

"(f) To each person who signs a petition there shall be adminstered the following oath, which shall be reduced to writing and made a part of each page of the petition: 'I know the contents of this petition. I am a qualified voter eligible to vote in the forthcoming primary election of the _____ Party for the office for which _____ is a candidate. I have not signed the petition of any other candidate for this office or I have withdrawn my signature for any other candidate in the manner provided by law, and I have

not signed the petition of a candidate who is running for any office in the primary of any other party. I understand that by signing this petition I became ineligible to affiliate with any other party or to participate in the primary elections, conventions, or other party affairs of any other party during the voting year in which this election is held.'

"(g) After a person has signed the petition of a candidate, the person's signature is void as to the petition of any candidate who is running in the primary election of any other party. He also becomes ineligible to affiliate with any other party during the voting year in which the election is held. If he participates or attempts to participate in the primary election or convention of any other party during that voting year, he is guilty of a misdemeanor and upon conviction is punishable by a fine not to exceed $1,000.

"(h) A petition may not be circulated for signatures earlier than 90 days preceding the deadline for filing the petition. Any signature obtained on or before the 91st day preceding the deadline is void. The officer who administers the oath required by Subsection (f) of this section shall verify that the correct date of signing is shown on the petition.

"(i) The secretary of state shall prescribe a form for the petition. However, a candidate may use any other form which complies with the requirements of this section."

Sec. 5. The following sections of the Texas Election Code are repealed: Section 186a, as amended (Article 13.08a, Vernon's Texas Election Code), Section 186a-1 (Article 13.08a-1), and Section 194, as amended (Article 13.16).

Sec. 6. If any provision of this Act or the applica-

tion thereof to any person or circumstances is held invalid, such invalidity shall not affect other provisions or applications of the Act which can be given effect without the invalid provision or application, and to this end the provisions of this Act are declared to be severable.

Sec. 7. (a) This Act is enacted as a contingent, temporary law, to become effective only as stated in Subsection (b) of this section; and if it does become effective, it expires on December 31, 1972.

(b) This Act becomes effective only upon the condition that, before January 1, 1972:

(1) the Supreme Court of the United States does not dispose of the appeal filed in that court from the judgment of the United States District Court for the Northern District of Texas, Dallas Division, in Civil Action No. CA 3-3635-C, styled Van Phillip Carter vs. Martin Dies, Jr., et al., by action which becomes final before January 1, 1972; or

(2) the Supreme Court of the United States affirms or refuses to review the judgment of the district court in the aforesaid case, or by other action taken upon an appeal of that case the Supreme Court rules that either of the following sections of the Texas Election Code as they exist before the amendments made by this Act violates the Constitution of the United States: Sections 185a, 186, 186a, 193, and 194.

(c) Not later than January 5, 1972, the Attorney General of Texas shall certify to the Governor and to the Secretary of State whether either of the two conditions stated in Subsection (b) has been fulfilled, and the Governor immediately shall issue his proclamation declaring whether this Act becomes effective. If either

of the conditions for effectiveness is fulfilled, the Act takes effect on the date of the Governor's proclamation.

(d) If this Act takes effect, upon its expiration on December 31, 1972, the law as it existed before the effective date of the Act again becomes operative until otherwise provided by the Legislature.

Sec. 8. The importance of this legislation and the crowded condition of the calendars in both houses create an emergency and an imperative public necessity that the Constitutional Rule requiring bills to be read on three several days in each house be suspended, and this Rule is hereby suspended.

Speaker of the House

Lieutenant Governor
President of the Senate

I hereby certify that H.B. No. 5 was passed by the House on June 4, 1971, by the following vote: Yeas 110, Nays 23.

Chief Clerk of the House

I hereby certify that H.B. No. 5 was passed by the Senate on June 4, 1971, by a viva voce vote.

Secretary of the Senate

APPROVED: ---
Date

Governor